

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB:6:OKL:POSTF-131798-02

HEDowns

date: June, 21, 2002

to: SB/SE Compliance, Area 10, Territory 1, Group 6, Stop 4102-TUL
Attn: Jan Swafford

from: Associate Area Counsel, SB/SE, Area 6, Oklahoma City

subject: Identity of taxpayer for purposes of Form 2848
In re: [REDACTED] Inc.

This is in response to your inquiry on June 11, 2002. You asked who could sign a Form 2848 Declaration of Representation or Power of Attorney, with respect to your audit of a Form 1120S return for the taxable year [REDACTED]. The corporation, which was an S corporation in [REDACTED], was sold by its sole shareholder at the beginning of calendar year [REDACTED], and was converted by the new owners to a C corporation. The C corporation retained the S corporation's EIN, and we assume retained its name and continued its business operations, uninterrupted.

ISSUE

Who has authority to sign a Form 2848 on behalf of the corporation in respect to the audit of the corporation's Form 1120S return for the taxable year [REDACTED]?

CONCLUSION

The Form 2848 in respect to the audit of the corporation's Form 1120S return for the taxable year [REDACTED] should be executed by a current officer of the corporation. If the audit indicates there are flow-through adjustments to be made to the return of the corporation's sole shareholder in [REDACTED], an audit of that individual's return can be opened, and the shareholder can, if he wishes, execute a Form 2848 in respect to the audit of that return.

DISCUSSION

From the information you provided, it appears that the sole shareholder of the S corporation made an arms-length sale of all the stock of the corporation to an unrelated party on [REDACTED]

██████. The buyer retained every aspect of the corporation as it was in the hands of the seller, except that the buyer terminated the S election, and became a C corporation. The sole shareholder of the S corporation, the seller, retained no interest in the corporation. The sole shareholder filed a short year Form 1120S return for the corporation, covering the first 17 days of ██████ which has not been opened for audit. The Form 1040 individual income tax returns of the former sole shareholder of the corporation, for taxable years ██████ and ██████, have not been opened for audit. The corporation's Form 1120 return for the remainder of the taxable year ██████ also has not been opened for audit.

Many issues can arise with respect to identity of the persons or entities who are primarily liable for tax deficiencies of a corporation where there has been a sale, reorganization, merger or acquisition. The determination turns on particular facts of the transaction, and on application of state law regarding the existence and capacity of corporations, and liability of successor corporations for a predecessor corporation's debts.

The general rule under Oklahoma law is that the outright purchase of one corporation's assets by another corporation does not carry with it the assumption by the buyer of the predecessor corporation's liabilities, unless the buyer has specifically agreed to assumption of liabilities, the successor corporation is a "mere continuation" of the predecessor corporation, the sale transaction is actually a "de facto" merger, or the transaction was fraudulently structured to escape liabilities. See, Pulis v. U.S. Electric Tool Co., 561 P.2d 68 (Okla. 1977). However, in the case of acquisition of one corporation by another through statutory merger or consolidation, the acquiring corporation generally does assume the liabilities of the absorbed corporation. See, 18 Okla. Stat. Ann. § 1088. In this case, it was the stock of the corporation that was sold, not its assets. The sale of all of a corporation's assets generally will result in the termination of that corporation's corporate existence, while a sale of all of the corporation's stock will not. In the case of a sale of stock, the corporation continues to exist, or is absorbed by way of merger or consolidation by another corporation. In this case, the corporation's existence as a entity continued through the change of ownership.

The corporation did change its nature, for tax purposes, in that it converted from an S corporation in the year at issue, to a C corporation in the subsequent year. An S corporation, with limited exceptions apparently not applicable here, isn't taxed at the corporate level. Its items of income, loss, deduction and

credit are passed through to its shareholders in computing their individual income tax liabilities. IRC § 1363(a). However, the corporation's income, losses, deductions and credits for tax purposes are determined at the corporate level. IRC §§ 1363(b), 1366(a) and (b). When the corporate Form 1120S return is under audit, the corporation is the taxpayer.

Adjustments to income, loss, deduction and credit items made to an S corporation's 1120S return will not produce a tax liability of the corporation for that year. And, IRC § 1371(b)(2) provides that there can be no carryforward or carryback arising at the corporate level for a taxable year for which the corporation is an S corporation. However, while the corporation is not potentially liable for a tax deficiency for taxable year [REDACTED], adjustments to the S corporation's return, such as redetermination of classification of an expense item as capital, could impact the successor corporation's tax accounting for subsequent years.

Adjustments to the S corporation's 1120S return for [REDACTED] may produce a tax consequence with respect to the individual income tax liability of its sole shareholder for that year. In that event, the shareholder's return should be opened for audit. At that point, the shareholder may execute a Form 2848 to designate a representative for purposes of the audit of his individual return.

In spite of the change of ownership and termination of its S election, the corporate entity appears to have continued its existence as a single corporate entity, uninterrupted. The taxpayer, under the particular facts presented, is the corporation. The Form 2848 must, therefore, be signed, on behalf of the corporation, by a current officer of the corporation. Treas. Reg. § 601.503(c)(3).

) If you have any questions regarding this advice, please call Senior Attorney Elizabeth Downs at (405)297-4820. This memorandum closes our file in this case.

MICHAEL J. O'BRIEN
Associate Area Counsel (SB/SE)

cc: Disclosure Office, OKC